IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

EVERETT HUFFMAN,
Plaintiff/Appellant,

v.

PAUL JACKSON; ROYCE HARTY; LIANE HENRY; JAMES O'ROURKE; MAGIC RANCH ESTATES HOMEOWNERS ASSOCIATION, AN ARIZONA NON-PROFIT CORPORATION; SNOW PROPERTY SERVICES, LLC; DUSTIN SNOW; BROWN COMMUNITY MANAGEMENT, INC.; CAROLYN MORGAN; ; VIAL FOTHERINGHAM, A FOREIGN LLP; MICHAEL LAMB; AND CHRISTINA MORGAN,
Defendants/Appellees.

No. 2 CA-CV 2018-0181
Filed October 17, 2019

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pinal County
No. S1100CV201600184
The Honorable Joseph Georgini, Judge

AFFIRMED

COUNSEL

Everett Huffman, Florence
In Propria Persona

Hill, Hall & Deciancio PLC, Phoenix
By R. Corey Hill, Ginette M. Hill, and Christopher Robbins
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Eppich and Judge Eckerstrom concurred.

E S P I N O S A, Judge:

¶1 Everett Huffman appeals the trial court's judgment of dismissal with prejudice of his complaint against his homeowners association, its individual members, and various attorneys. He contends the court erred in finding his complaint insufficient, alleging numerous instances of misconduct, wrongs, and injuries committed by the court.[1] He also challenges the court's award of attorney fees to defendants, denial of his motions to amend and to compel discovery, and refusal to recuse from the case. For the following reasons, we affirm.

Procedural Background

¶2 In January 2016, Huffman sued Magic Ranch Estates Homeowners Association and its board of directors (collectively, "HOA Defendants"), Snow Property Services, Dustin Snow, Brown Community Management, and lawyers Vial Fotheringham, Michael Lamb, Christina Morgan, Clint Goodman, and Scott Potter.[2] His complaint alleged claims of intentional infliction of emotional distress, fraud and misrepresentation, negligent infliction of emotional distress, violations of the Fair Debt Collection Practices Act, nuisance and breach of quiet enjoyment, and a "derivative action." All but one of the HOA Defendants jointly moved to dismiss the complaint for failing "to set forth the elements of any cognizable legal theory against" them. The trial court denied the motion as to the claims for intentional infliction of emotional distress, negligent infliction of

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[1] Although Huffman represents himself on appeal, we note that a self-represented party is held to the same standards as an attorney and entitled to no special consideration due to his pro se status. *See Kelly v. NationsBanc Mortg. Corp.*, 199 Ariz. 284, ¶ 16 (App. 2000).

[2] Huffman's complaint also named the Arizona Association of Community Members as a defendant, but it was never served. Unserved defendants are not parties. *McHazlett v. Otis Eng'g Corp.*, 133 Ariz. 530, 532 (1982).

emotional distress, and nuisance, and permitted amendment of the complaint to cure deficiencies in the "fraud/misrepresentation," and "derivative action" claims.

¶3 Huffman amended his complaint, alleging the same claims and defendants as before, except for his claim of nuisance, which he removed. Goodman and Potter moved to dismiss for failure to timely effect service and were subsequently dismissed from the case. In December 2016, pursuant to a routine administrative order, Huffman's case was reassigned to Judge Georgini, and Huffman thereafter filed an "affidavit of prejudice," claiming "[i]t would be hard if not impossible for Judge Georgini to be fair and impartial" because he previously had worked with a judge presiding over a different case of Huffman's and the two "are friends and socialize." A different judge treated Huffman's affidavit as a motion for change of judge for cause under Rule 42.2, Ariz. R. Civ. P., and denied it, determining Huffman's allegations about Judge Georgini, "even if true, do not support disqualification." The judge also ruled that because Huffman had not complied with the requirements of Rule 42.2 and A.R.S. § 12-409, he had waived the issue.

¶4 The HOA Defendants, along with Snow Property Services, Snow, and Brown Property Management filed a motion to dismiss Huffman's amended complaint, claiming it "fail[ed] to set forth the elements of any cognizable legal claim against any" of them. Fotheringham, Morgan, and Lamb also moved to dismiss, asserting "failure to state a claim [for] which relief may be granted." Huffman responded that he had "mistakenly omitted" his nuisance claim and requested to amend the complaint "by interlineations or however the Court wishe[d]." Huffman did not, however, request leave to file another amended complaint.

¶5 After oral argument on the motions, the trial court granted both motions to dismiss and, after denying Huffman's later motion to file a second amended complaint, entered final judgment in favor of the HOA Defendants. The court also awarded those defendants their attorney fees and taxable costs. We have jurisdiction over Huffman's appeal pursuant to A.R.S. § 12-2101(A)(1).

Motions to Dismiss

¶6 Huffman first contends the trial court erred in dismissing his amended complaint, claiming it stated numerous and "egregious" grounds

for intentional infliction of emotional distress, negligent infliction of emotional distress, negligence, and violations of the Fair Debt Collection Practices Act.[3] We review a trial court's ruling on a motion to dismiss de novo. *Coleman v. City of Mesa*, 230 Ariz. 352, ¶ 7 (2012). In doing so, we look only to the complaint, assuming the truth of all "well-pled factual allegations" and drawing all reasonable inferences therefrom. *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, ¶ 7 (2008). But we will uphold dismissal "if the plaintiff[] would not be entitled to relief under any facts susceptible of proof in the statement of the claim." *Mohave Disposal, Inc. v. City of Kingman*, 186 Ariz. 343, 346 (1996). Moreover, "we do not accept as true allegations consisting of conclusions of law, inferences or deductions that are not necessarily implied by well-pleaded facts, unreasonable inferences or unsupported conclusions from such facts, or legal conclusions alleged as facts." *Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386, ¶ 4 (App. 2005).

Infliction of Emotional Distress

¶7 To state a claim for intentional infliction of emotional distress (IIED), the plaintiff must show (1) the defendant's conduct was extreme and outrageous; (2) the defendant either intended to cause emotional distress or acted with reckless disregard that such distress would result; and (3) the plaintiff suffered severe emotional distress as a result. *McKee v. State*, 241 Ariz. 377, ¶ 25 (2016). Extreme and outrageous conduct "go[es] beyond all possible bounds of decency" and is "regarded as atrocious and utterly intolerable in a civilized community." *Shepherd v. Costco Wholesale Corp.*, 246 Ariz. 470, ¶ 19 (App. 2019) (quoting *Mintz v. Bell Atl. Sys. Leasing Int'l, Inc.*, 183 Ariz. 550, 554 (App. 1995)). The liability for this tort "clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." Restatement (Second) of Torts § 46 cmt. D (1965). To state a claim for negligent infliction of emotional distress (NIED), on the other hand, the plaintiff must show that he "witnessed an injury to a closely related person, suffered mental anguish manifested as physical injury, and was within the zone of danger so as to be subjected to

[3] The trial court also dismissed Huffman's fraudulent misrepresentation and derivative action claims, which he does not appear to challenge. Accordingly, any argument related to these claims is waived. *See Sholes v. Fernando*, 228 Ariz. 455, n.1 (App. 2011) ("failure to develop and support argument waives issue on appeal"); *see also* Ariz. R. Civ. App. P. 13(a)(7).

an unreasonable risk of bodily harm created by the defendant." *Rodriguez v. Fox News Network, L.L.C.*, 238 Ariz. 36, ¶ 7 (App. 2015).

¶8 Huffman maintains his amended complaint stated sufficient claims for both IIED and NIED. He alleged all the defendants had "[e]ngaged in a [p]lan and scheme to discourage [his] participation" in the homeowners association board, "file[d] a flurry of violations against [him] as punishment," withheld requested documents, made false statements "to influence the [b]oard," assessed fines, improperly conducted HOA business, moved mailboxes causing "noise all hours of the night," and "install[ed] park benches right below [his] master bedroom window resulting in noise all hours of the night." As a result, he claimed he "has suffered loss of sleep, anxiety, high blood pressure, [s]tress, worry, nausea, grief, nervousness, mental anguish, [and] anger."

¶9 But Huffman did not allege the defendants took these actions to intentionally cause him emotional distress or in reckless disregard that distress would result. Moreover, the actions he complained of are, at most, "annoyances" or "petty oppressions," Restatement § 46 cmt. D, and do not rise to the level of extreme and outrageous conduct that is "beyond all possible bounds of decency" or "utterly intolerable in a civilized community," *Shepherd*, 246 Ariz. 470, ¶ 19 (quoting *Mintz*, 183 Ariz. at 554). Nor did any of the facts alleged support a claim for NIED, as Huffman did not allege he witnessed an injury to a closely related person or was within the zone of danger such that he was subjected to an unreasonable risk of bodily harm. *See Rodriguez*, 238 Ariz. 36, ¶ 7. Accordingly, the trial court did not err in concluding Huffman failed to state a claim for IIED and NIED upon which relief could be granted against any of the defendants. *See Coleman*, 230 Ariz. 352, ¶ 7.

Negligence

¶10 To state a claim for negligence, a plaintiff must establish "(1) a duty requiring the defendant to conform to a certain standard of care; (2) a breach by the defendant of that standard; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual damages." *Gipson v. Kasey*, 214 Ariz. 141, ¶ 9 (2007). Alleging the same facts as in his IIED and NIED claims, Huffman also claimed the defendants "owed a duty to [him] to abide by the statutes, CC&Rs, not violate his due process rights, make honest statements and follow the proper procedures and policies." He alleged the defendants breached those duties and he suffered "fines, wasted time and effort, [and] emotional distress." But Huffman's

complaint did not contain facts supporting his assertion that any of the defendants owed a duty to him, and his allegations regarding breach were wholly conclusory. *See Jeter*, 211 Ariz. 386, ¶ 4 (courts do not accept allegations consisting of conclusions of law as true). He asserted the defendants had violated certain statutes, without any factual detail describing how or, in many instances, when those violations occurred. We thus agree with the trial court that his negligence claim did not give defendants fair notice of the basis of claims being asserted against them and therefore failed to state a claim against any of the defendants. *See Cullen*, 218 Ariz. 417, ¶ 6.

Fair Debt Collection Practices Act (FDCPA)

¶11 Huffman also challenges the dismissal of his FDCPA claim against Fotheringham, Lamb, and Morgan.[4] Huffman alleged they were "attorneys at law and debt collectors," claiming they had asserted in a July 2015 letter he owed a retroactive $25 per day fine, rejected his monthly electronic payments then sent another July 2015 letter that he owed money, "failed to comply with the notice and validation requirements," "tried and demanded to collect amounts not expressly authorized," "engaged in false, deceptive and misleading representations" by letter and email, and "engaged in harassing, oppressive and abusive conduct." Huffman's complaint is insufficient to state a claim for relief because he failed to plead facts that establish Fotheringham, Lamb, and Morgan are subject to the FDCPA as debt collectors, instead simply concluding they are. *See* 15 U.S.C. § 1692a. Additionally, Huffman pled legal conclusions supported only by vague factual assertions that defendants had sent two letters in the course of one month stating he owed money. Because we reject legal conclusions and only regard the well-pleaded facts alleged in the complaint as true, *see Jeter*, 211 Ariz. 386, ¶ 4, we see no error in the trial court's conclusion that

[4]These defendants did not file an answering brief, which we may deem a confession of reversible error if a debatable issue has been raised. *See Nydam v. Crawford*, 181 Ariz. 101, 101 (App. 1994). Because resolution of cases on their merits is preferred, and Huffman's claims appear to lack merit on their face, in our discretion, we address this issue. *See id.* (confession of reversible error doctrine discretionary); *Adams v. Valley Nat'l Bank of Ariz.*, 139 Ariz. 340, 342 (App. 1984) (courts prefer to decide cases on their merits).

Huffman's complaint failed to state a claim for violations of the FDCPA, *see Cullen*, 218 Ariz. 417, ¶ 6.

Motion to Amend Complaint

¶12 Huffman also argues the trial court erred by denying his motion to file a second amended complaint, pointing out that under Rule 15(a)(2), Ariz. R. Civ. P., leave to amend a pleading "must be freely given when justice requires." "We review the denial of a request to amend for an abuse of discretion." *Carranza v. Madrigal*, 237 Ariz. 512, ¶ 13 (2015).

¶13 A trial court may deny leave to amend if it finds undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by previous amendments, or undue prejudice to the opposing party. *Id.* Huffman has not demonstrated that justice required the court to grant his motion here, especially when the request came ten months after the trial court had dismissed all claims against all defendants and after the HOA Defendants had lodged a proposed judgment with the court.[5] The court did not abuse its discretion by denying Huffman's motion. *See Owen v. Superior Court*, 133 Ariz. 75, 81 (1982) (Denial of leave to amend is "a proper exercise of the court's discretion when the amendment comes late and raises new issues . . . thus requiring delay in the decision of the case.").

Grant of Attorney Fees

¶14 Huffman next challenges the trial court's award of attorney fees to the HOA Defendants pursuant to A.R.S. § 12-341.01, arguing his claims did not arise out of contract. The HOA Defendants disagree, asserting Huffman "primarily alleged that the HOA Defendants breached so-called fiduciary duties that he claims were owed to him under the HOA's declaration . . . a contract among the parties." We review a trial court's award of attorney fees for an abuse of discretion. *Hale v. Amphitheater Sch. Dist. No. 10*, 192 Ariz. 111, ¶ 20 (App. 1998).

¶15 Section 12-341.01(A), A.R.S., provides that "[i]n any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees." The meaning of that language

[5]Huffman argues he was prevented from filing any pleadings until the trial court had ruled on the pending motions to dismiss, but he was not ordered to cease filing pleadings until January 2018—one year after the defendants had filed their motions to dismiss his first amended complaint.

is construed broadly, and, when tort claims are alleged, they arise out of contract when they "could not exist 'but for' the breach or avoidance of contract." *ML Servicing Co. v. Coles*, 235 Ariz. 562, ¶¶ 30-31 (App. 2014) (quoting *Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc.*, 198 Ariz. 10, ¶ 27 (App. 2000)); *see also Modular Mining Sys., Inc. v. Jigsaw Techs., Inc.*, 221 Ariz. 515, ¶¶ 22-23 (App. 2009) (attorney fees recoverable for "litigating interwoven and overlapping contract and tort claims"). In determining whether the action arises out of contract, we are not "bound by the form of the pleadings" but may look "to the nature of the action and the surrounding circumstances." *Hiatt v. Shah*, 238 Ariz. 579, ¶ 18 (App. 2015).

¶16 We agree with the HOA Defendants that Huffman's claims against them arose out of contract or were so intertwined with the contract claims that attorney fees were recoverable. *See Modular Mining*, 221 Ariz. 515, ¶¶ 22-23. All of Huffman's claims relied on the same factual allegations, and although four out of five were tort claims, they revolved around the HOA Defendants' alleged violations of the HOA's CC&Rs and governing policies. "CC & Rs constitute a contract between the subdivision's property owners as a whole and individual lot owners." *Ahwatukee Custom Estates Mgmt. Ass'n v. Turner,* 196 Ariz. 631, ¶ 5 (App. 2000). But for the existence of the CC&Rs and the obligations allegedly imposed on the HOA Defendants under that contract, Huffman's claims would not exist. *See Ramsey Air Meds, L.L.C.*, 198 Ariz. 10, ¶ 27.

¶17 Huffman also contends the HOA Defendants' application for attorney fees did not comply with Rule 54(G), Ariz. R. Civ. P., because the affidavit did not disclose the terms of the fee agreement. But the affidavit stated the HOA Defendants were "charged $185 per hour for the work set forth in the attached bills," as required by *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 188 (App. 1983). Additionally, Huffman maintains the award was improper because the application contained "entries that sought fees that had [nothing] to do with the pending case" and "listed duplicative and fraudulent charges." But he has failed to explain how those entries were duplicative, fraudulent, or unrelated to the litigation. Thus, Huffman has not demonstrated the trial court abused its discretion in its fee award. *See State ex rel. Corbin v. Tocco*, 173 Ariz. 587, 594 (App. 1992) (once application and affidavit meets minimum requirements, other party must

demonstrate why billing entries are "immaterial, irrelevant or otherwise unreasonable").[6]

Motion for Change of Judge for Cause

¶18 Huffman lastly challenges the denial of his motion for change of judge for cause, arguing the trial court "erred in refusing to remove himself from the case." Huffman does not address his failure to comply with Rule 42.2(c), which as noted above, was an independent ground for denial of his motion. Huffman has therefore waived this issue on appeal. *See Sholes v. Fernando*, 228 Ariz. 455, n.1 (App. 2011); *see also* Ariz. R. Civ. App. P. 13(a)(7). Notwithstanding waiver on this ground, Huffman has also waived his argument that the court should have been disqualified due to his social contacts and former employment relationship with a judge presiding over a separate case. Huffman fails to explain how those circumstances created any impropriety, bias, or unfairness. *See Modular Sys., Inc. v. Naisbitt*, 114 Ariz. 582, 587 (App. 1977) (issues deemed abandoned when party "failed to state with any particularity why or how the trial court erred in making these rulings and simply concludes that error was committed").

¶19 Finally, as to Huffman's complaints of multiple adverse rulings, which he claims "point[s] to bias, unfairness, and the appearance of impropriety," it is well established that "generally, 'the bias and prejudice necessary to disqualify a judge must arise from an extra-judicial source and not from what the judge has done in his participation in the case.'" *In re Aubuchon*, 233 Ariz. 62, ¶ 16 (quoting *Smith v. Smith*, 115 Ariz. 299, 303 (App. 1977)); *see also Stagecoach Trails MHC, L.L.C. v. City of Benson*,

[6]Huffman also contends the HOA Defendants were not entitled to the award because they failed to comply with the HOA's violation policy and A.R.S. § 33-1803. Because he has failed to explain how the HOA's policy and the statute apply to the circumstances in this case or otherwise develop his argument, we conclude, again, that Huffman has waived this contention on appeal. *See In re Aubuchon*, 233 Ariz. 62, ¶ 6 (2013) (arguments not supported by adequate explanation, citations to the record, or authority considered waived).

232 Ariz. 562, ¶ 21 (App. 2013). The motion for change of judge was properly denied.[7]

Attorney Fees and Costs on Appeal

¶20 The HOA Defendants request an award of attorney fees incurred on appeal pursuant to § 12-341.01. In our discretion, we decline to award fees on appeal. *See Deutsche Credit Corp. v. Case Power & Equip. Co.*, 179 Ariz. 155, 164 (App. 1994) (appellate court's authority to award fees pursuant to § 12-341.01 discretionary). However, as the prevailing parties, the HOA Defendants are awarded their costs on appeal upon compliance with Rule 21, Ariz. R. Civ. App. P.

Disposition

¶21 For the foregoing reasons, the trial court's judgment is affirmed.

[7]Huffman also argues the trial court erred in denying his motion to compel discovery. In view of our affirmance of the court's dismissal of all of Huffman's claims with prejudice, we need not address this issue.